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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

MAY 6 1997

In the Matter of	)	
Petition of MCI for Declaratory	)	
Ruling that New Entrants Need Not	)	**CCBPol 97-4**
Obtain Separate License or Right-to-Use	)	**CC Docket No. 96-98**
Agreements Before Purchasing Unbundled	)	
Network Elements Under Section 251(c)(3)	)	
of the Telecommunications Act of 1996	)	

REPLY COMMENTS OF MCI

The central question raised in this proceeding in the Federal Communications Commission's (the "FCC" or the "Commission") public notice is whether access to unbundled elements made available to CLECs by ILECs pursuant to section 251 of the Telecommunications Act of 1996, 47 U.S.C. § 251, necessarily implicates the intellectual property rights of equipment vendors or other third parties. Public Notice, Pleading Cycle Established for Comments on Petition of MCI, CCBPol 97-4, CC Docket No. 96-98 (March 14, 1997). The Commission goes on to seek comment on a series of other questions regarding the burden imposed by obtaining intellectual property rights of the 1996 Act. In particular, the Commission sought comment on the intellectual property issues implicated by access to unbundled switching, access to other unbundled network elements, and the resale of ILEC retail services.

Although these inquiries may bear some limited relevance to the resolution of issues raised in MCI's request, we believe the Commission's emphasis is misplaced. The focus of MCI's petition -- and thus, the central issue before the Commission -- is whether it is a violation of the Act for a state or an ILEC to require a CLEC to obtain separate license or right-to-use agreements before the requesting carrier may purchase unbundled elements. As such, the Commission need not undertake an exhaustive review of the nature or scope of third party intellectual property rights in order to dispose of the issues raised in MCI's petition.

Nevertheless, comments filed in response to the public notice confirm that the threat to the intellectual property rights of third parties posed by the sale of unbundled elements has been vastly overstated. The comments filed also demonstrate that the burden to accommodate third parties is not heavy -- if, and only if, that burden falls on the ILECs. Of necessity, ILECs have superior knowledge about their own license agreements, equipment and services, and have superior bargaining position with the third party vendors whom they have selected. In contrast, if CLECs are required to accommodate the ILECs third party vendors, the burden on the CLECs (and the resulting deterrence of competition in the local market) will be enormous because the CLECs will be placed in an untenable negotiating posture. CLECs will be the captive of third party vendors with whom they must reach an agreement, but will not have any of the information necessary to evaluate the terms of such an agreement..

Given that third-party intellectual property rights will rarely be implicated and that the burden on the ILECs to accommodate third party vendors is minimal, there is no justification for the Texas Public Utility Commission's decision to require CLECs to obtain licenses from all third party vendors. Indeed, as the commenters in this proceeding overwhelmingly agree, the ensuing burden imposed by the Texas Commission on CLECs serves only to benefit the ILECs by delaying competition in the local marketplace.

I. The ILECs' Claims That Resale and Sale of Unbundled Elements Will Violate the Intellectual Property Rights of Third Parties Are Speculative and Without Basis in Fact

The ILECs, principally SWBT, provide a treatise on intellectual property rights, but identify only two areas of potential concern. SWBT's Milgrim affidavit likewise identifies only 1) that CLECs' use of unbundled elements might violate the personal and non-transferable nature of the ILECs' licenses (Milgrim Aff. ¶ 19) and 2) that access to vendor source code by the CLECs would violate the confidentiality restrictions in ILEC software licenses (Milgrim Aff. ¶¶ 20-21). As described below, both of these claims are phantoms.

First, the personal and nontransferable nature of the licenses is totally irrelevant. The ILECs necessarily have the right to use the hardware and software that they have purchased from a third party vendor and to sell services that use that hardware and software. This basic principle is embodied in the doctrine of patent exhaustion. See United States v. Univis Lens Co., 316 U.S. 241, 252, (1942); Intel Corp. v. ULSI System Technology, 995 F.2d 1566, 1568 (Fed. Cir. 1993). Absent such protection, a purchaser of equipment (a switch, for example) that was a patented product or used a patented method or process could not use the equipment for its intended purpose. Once the patent holder or licensor has been compensated by the ILEC for the product, the ILEC can use the product (including selling telecommunications services) without fear of a suit for infringement or violation of the license. Further, customers of the ILEC -- here CLECs -- can purchase and use the telecommunications services free of any claim of infringement.

Moreover, if common practice is followed, it is virtually certain that the ILECs' agreements with third party vendors include indemnification clauses or customer rights' provisions to protect ILEC customers from being sued by manufacturers for intellectual property violations.[1] Nortel Comments at 3. So long as a CLEC does not physically control an ILEC's switch (and, as the First Report and Order[2] stressed, the ILEC at all times maintains physical control of the switch), the CLEC should be in a position identical to that of any other ILEC customer, and be protected by the same contractual provisions as the ILEC customer.

The comments filed by Southwestern Bell and Pactel recognize this point with respect to the resale of ILEC services (see comments at 14-15). There is no reason why this principle should not apply equally when a CLEC purchases unbundled network elements. In each situation, the CLEC is a wholesale customer of the ILEC.

The ILECs' second area of concern are the copyright and confidentiality restrictions that might be implicated by CLEC access to the source code and other materials licensed by a software vendor. Milgrim postulates that if CLEC's, such as MCI, were to access the licensed source code, that access might violate the licensor's intellectual property interests (Milgrim at ¶ 21-22). But, this concern is based on pure conjecture. As the Commission has made clear -- and the ILEC's have provided no concrete example to the contrary -- the ILEC's are in charge of their own services and there is little if any chance that CLEC's will access the source code in ILEC equipment to provide any service.

Similarly, software utilized to operate equipment necessary for the provision of local services may be copyright protected, but such protection would only prohibit the copying, derivation or distribution of the protected writing, 17 U.S.C. § 106. A CLEC will generally have

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[1]Without such provisions, a person making a telephone call could (under the ILECs' view) be liable for violating the vendor's intellectual property.

[2]Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (1996) ("First Report and Order"), ¶258.

no need to engage in such conduct in the normal provision of local service through the use of unbundled elements. Likewise, it would be highly unlikely that an ILEC would need to disclose any trade secrets of a third party vendor to a CLEC just so that the CLEC could use unbundled elements; even if it were necessary, a nondisclosure agreement (which costs nothing) with the vendor is all that would be required to protect such secrets.

The comments of Northern Telecom, Inc. (Nortel), a major manufacturer of switches, are particularly instructive in this regard. The Nortel comments make clear that no concern will arise "if a request for unbundled elements can be accommodated by Nortel's customer in a manner that does not require the requesting party to be given direct access to Nortel's software or proprietary information." Nortel Comments at 7. This is equally true for the resale context. Id. at 8. As Nortel explains, assuming no access to the third party vendor's equipment or software, a CLEC that purchases unbundled network elements or resale services from the ILEC should have the same rights with respect to provision of telecommunications services (and should be subject to the same limitations) as the ILEC has under the ILEC's agreements with third party vendors. Id. Given that access to or modification of third party vendor hardware and software will not typically be necessary, there will rarely be any threat to the vendor's intellectual property interests.

Given these general principles, it is hardly surprising that the ILECs have not identified a single instance in which a problem of this nature has arisen when an ILEC has made network elements available to a competitor. ILECs have made unbundled elements available to new entrants in several states as a matter of state law prior to passage of the 1996 Act. (see AT&T Comments at 21-28). Despite this experience, no ILEC raised any concern in the proceedings leading to the First Report and Order[3] that the Commission's proposed unbundling requirements would raise material issues respecting the intellectual property rights of third party vendors. The ILECs' sudden discovery of this issue is simply another delaying tactic to slow the pace of competition in the market for local service.

II. To the Extent That There Is Any Burden to Accommodate the Intellectual Property Interests of Third Party Vendors, the Burden Must Fall on the ILEC

If, however, there are situations in which the purchase of unbundled elements implicates the intellectual property rights of third party vendors, the ILEC must bear the burden of remedying those interests. Section 251(c)(4) of the Act requires ILECs to make available to CLECs for resale all telecommunications services that the carrier provides to subscribers that are not telecommunications carriers. This grant has little meaning if the ILEC need not pass on the right to use (and sell) the service -- a right that the ILEC obtains and passes on as part of its services to every other of its customers. Similarly, under Section 251(c)(3), the ILEC must make unbundled network elements available to requesting carriers "in a manner that allows requesting carriers to combine such elements in order to provide [a] . . . telecommunications service." Unbundled elements have little use if they cannot, because of third-party intellectual property interests or any other reason, be assembled into a saleable service. Section 251 thus places the burden squarely on the ILEC to satisfy any intellectual property concerns of vendors from whom the ILEC chose to buy its equipment.

Indeed, that is precisely the result the Commission reached when faced with a

[3] First Report and Order at ¶415.

closely analogous issue under § 259 of the Act. See Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-237), at 69. Section 259(a) of the Act contains language similar to that of Section 251: ILECs must make available to qualifying carriers technology and other information "for the purpose of enabling the qualifying carrier to provide telecommunications services." In that context, the Commission concluded that:

> Whenever it is the only means to gain access to facilities or functions subject to sharing requirements, Section 259(a) requires the providing LEC to seek to obtain and to provide necessary licensing of any software or equipment necessary . . ., subject to reimbursement for or the payment of reasonable royalties.

The Commission further concluded that

> In the ordinary course, . . . we fully anticipate that such licensing will not be necessary. We believe that . . . infrastructure sharing can be accomplished through the use of agreements whereby providing incumbent LECs who own or lease certain types of information or other intellectual property provide functionalities and services to qualifying carriers without the need to transfer information that is legitimately protectable."

Id. at 70. Although the Commission believed that licensing would not usually be necessary, the Commission determined that "[i]ncumbent LECs may not evade their . . . obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers. Id. To that end, "the providing incumbent LEC must determine an appropriate way to negotiate and implement . . . agreements with qualifying carriers, i.e., without imposing inappropriate burdens on qualifying carriers. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." Id.

This rationale applies with even more force to the present situation. Where CLECs purchase unbundled elements to compete directly with ILECs, ILECs have every incentive to forestall competition through insubstantial claims that third party intellectual property rights will be implicated. Although as discussed above, these claims will rarely be valid, without access to the ILECs' licensing agreements and the detailed information about the ILECs' equipment (and the manner in which that equipment is used), CLECs have no possibility of evaluating such claims. There is little doubt that ILECs are in a better position than CLECs (based on their access to necessary information) to know when license modifications are needed, as well as the nature of those modifications.[4] Moreover, new entrants do not have the bargaining power that ILECs possess to effect any needed changes in existing licensing agreements. When the ILECs chose the vendors of their equipment and negotiated licensing agreements they had an opportunity to select their vendors based, among other things, on the cost of any intellectual property rights. CLECs forced to deal with the ILECs' chosen vendors will have no such options and vendors will have little or no incentive to give CLECs (particularly small CLECs and resellers that do not purchase much of their own equipment) favorable terms.

In the end, imposition of such a requirement on CLECs is unnecessary, burdensome, and a potentially significant basis for the delay of competition in the local marketplace, as well as a clear violation of sections 251 and 253 of the Act.

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[4]As SBC admits in its comments, "determining whether there is potential infringement requires a close examination of the particular patents at issue and the nature of the use." SBC Comments at 5.

Conclusion

For the reasons discussed above, the Commission should issue a declaratory ruling that new entrants need not obtain separate licenses or right-to-use agreements before they can purchase unbundled network elements, and that any requirement that they do so violates §§ 251 and 253 of the Act.

Respectfully submitted,

Lisa B. Smith
MCI Telecommunications Corp.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2992

Donald B. Verrilli, Jr.
Thomas J. Perrelli
Jodie L. Kelley
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Dated: May 6, 1997

CERTIFICATE OF SERVICE

I, Mellanese Farrington, hereby certify that on this 6th day of May, 1997, I served by first-class United States Mail, postage prepaid, a true copy of the foregoing Reply Comments of MCI Telecommunications Corporation, Inc. upon the following:

ITS
2100 M Street, N.W.
Room 140
Washington D.C. 20037

Regina Keeney*
Chief, Common Carrier Bureau
FCC
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Richard Welch*
Chief, Policy and
Programming Planning Division
FCC
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Janice Myles*
Common Carrier Bureau
FCC
1919 M Street, N.W., Room 544
Washington, D.C. 20554

James D. Schlichting*
Chief, Competitive Pricing Division
FCC
1919 M Street, N.W.
Room 518
Washington, D.C.

Richard Metzger*
Deputy Chief, Common Carrier Bureau
FCC
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Lawrence W. Katz
Attorney for the Bell Atlantic Telephone Companies
1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201

Jack M. Farris
Attorney for the NYNEX Telephone Companies
1095 Avenue of the Americas
Room 3812
New York, New York 10036

Michael J. Karson
Attorney for Ameritech
Room 4H88
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

David W. Carpenter
Peter D. Keisler
Daniel Meron
SIDNEY & AUSTIN
One First National Plaza
Chicago, IL 60603

James D. Ellis
SBC Communications, Inc.
175 E. Houston Street
San Antonio, Texas 78205

Martin E. Grambow
SBC Communications, Inc.
1401 I Street, N.W., Suite 1000
Washington, D.C. 20005

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Harlie D. Frost
Southwestern Bell Telephone Company
One Bell Center, Suite 3520
St. Louis, Missouri 63101

Randall E. Cape
Attorney for Pacific Bell and Nevada Bell
140 New Montgomery Street
Room 1517
San Francisco, California 94105

Louise L.M. Tucker
Bell Communications Research, Inc.
2101 L Street, N.W.
Washington, D.C. 20037

M. Robert Sutherland
A. Kirven Gilbert III
BellSouth Corporation
1700 Peachtree Street, N.E.
Suite 1700
Atlanta, Georgia 30309-3610

Liz Bills
Assistant Attorney General
Natural Resources Division
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Rodney L. Joyce
Ginsburg, Feldman and Bress, Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Stephen L. Goodman
Melanie Haratunian
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue, N.W.
Suite 650, East Tower
Washington, D.C. 20005

Robert J. Aamoth
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Anne K. Bingaman
Doug Kinkoph
LCI International Telecom Corp.
8180 Greensboro Drive, Suite 800
McLean, Virginia 22102

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, D.C. 20006

Michael A. Holmes
Craig A. Anderson
Ameritech Michigan
444 Michigan Avenue, Room 1750
Detroit, Michigan 48226

Mark C. Rosenblum
Roy E. Hoffinger
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Mellanese Farrington

Mellanese Farrington

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